

1 way to proceed.

2 JUDGE CHACHKIN: Are you going to supply copies to  
3 the parties?

4 MR. DZIEDZIC: Your Honor, that's my concern.

5 JUDGE CHACHKIN: Mr. Silberman, are you going to  
6 supply copies to the parties of your request to the General  
7 Counsel?

8 MR. BLOCK: Let me think about that for a second.

9 MR. DZIEDZIC: May I be heard, Your Honor?

10 JUDGE CHACHKIN: One second. I'm waiting for Mr.  
11 Block.

12 MR. BLOCK: We will inform counsel of the names of  
13 the persons --

14 MR. DZIEDZIC: No.

15 MR. BLOCK: -- we've requested. I don't know  
16 whether our internal memorandum to the General Counsel need  
17 be disclosed. I don't believe it will contain anything  
18 other than a request --

19 MR. DZIEDZIC: No. But --

20 MR. BLOCK: -- stated by Mr. Silberman, but I  
21 wonder about whether that waives any privilege or any sort  
22 of internal communications rights we have, and I'm just not  
23 prepared off the cuff to say of course we'll turn something  
24 over that is essentially an internal Commission memorandum  
25 that relates to the operations of our office.

1 JUDGE CHACHKIN: Well, it seems to me in order to  
2 maintain this neutrality, it seems to me essential that  
3 anything that you file with the General Counsel in  
4 connection with this proceeding should be made available to  
5 the parties.

6 MR. BLOCK: Well, we will then.

7 MR. DZIEDZIC: Your Honor --

8 JUDGE CHACHKIN: They will make it available to  
9 the parties.

10 MR. DZIEDZIC: I know. We're not a party.

11 JUDGE CHACHKIN: Yes, Mr. Dziedzic.

12 MR. DZIEDZIC: Your Honor, this is part and parcel  
13 of my concern, and it has to do with the way this procedure  
14 was explained at the outset of the hearing conference.

15 I am making my statement at this time to preclude  
16 the necessity of filing a document that would be in the  
17 nature of an opposition since I am hopeful that to the  
18 extent that my clients will be called as witnesses, they can  
19 appear as witnesses in the spirit of cooperation.

20 The Commission rules plainly vest only with the  
21 Commission the authority to order depositions of Commission  
22 employees. I am concerned about a process whereby a  
23 document will be filed with the Office of General Counsel,  
24 an entity that plainly does not have delegated authority to  
25 make that ruling as opposed to being filed with the

1 Commission itself.

2 I do not understand the need for that process. It  
3 seems unnecessarily cumbersome and the rule plainly --

4 JUDGE CHACHKIN: Well, if the General Counsel is  
5 the one that passes on the question of this nature, then it  
6 would be proper to file with the General Counsel.

7 MR. DZIEDZIC: The rule clearly states -- Section  
8 1.331 clearly states, "It is the Commission that will rule  
9 on this matter." It does not delegate that authority to the  
10 General Counsel. This is just a matter of clarity. In the  
11 event that a document is directed to the General Counsel, I  
12 think that's the incorrect body to which to direct the  
13 document.

14 The next question -- the next point in my view is  
15 my concern that there may be other documents that go forward  
16 to the General Counsel's Office or the Commission that  
17 aren't served on the parties and aren't public documents.

18 In a proceeding of this nature in which the issue  
19 is ex parte contacts, it's plain that every aspect of the  
20 process must be infused with integrity. And I think an open  
21 and public disclosure of any filings or submissions made by  
22 the separated trial staff to the agency, the Office of  
23 General Counsel, or any decision maker, must be open and  
24 public documents.

25 I believe it was Mr. Silberman earlier that made

1 reference to requesting expedition of the General Counsel's  
2 Office. I have no objection to that if that expedition  
3 request is made in a document served on all of the parties.  
4 Because requests for expedition made of decision-making  
5 persons at the agency in a restrictive proceeding is  
6 precluded by the Commission's ex parte rules.

7 I would urge the parties to reconsider the  
8 necessity of all depositions, and I will explain why. As  
9 Mr. Cole indicated, there is a substantial record that has  
10 already been developed in this case. We will not be  
11 satisfied with a submission that goes to the Commission that  
12 merely lists the names of the persons to be the subject of  
13 depositions.

14 I think there has to be a showing as to the extent  
15 to which that testimony is necessary. There are questions  
16 of deliberative process privilege that exists here. There  
17 are questions of my clients' attorney-client privilege with  
18 the agency that exists here also.

19 JUDGE CHACHKIN: What attorney-client privilege?  
20 With the agency?

21 MR. DZIEDZIC: All attorneys who represent the  
22 Federal Communications Commission in any aspect of any  
23 proceeding have an attorney-client relationship with that  
24 agency.

25 JUDGE CHACHKIN: Well, is the agency going to

1 raise the attorney-client privilege?

2 MR. DZIEDZIC: I would submit to you, Your

3 Honor --

4 JUDGE CHACHKIN: I would think the agency by  
5 designating these issues indicates they want a full airing  
6 of these issues. I believe --

7 MR. DZIEDZIC: I have to disagree with you, Your  
8 Honor. The Hearing Designation Order is interestingly  
9 silent on this issue. It seems to me that if the Commission  
10 contemplated waiving attorney-client privilege and waiving  
11 the deliberative process privilege, it would have done so in  
12 the Hearing Designation Order.

13 That does not -- I do not mean to suggest that the  
14 agency will not do so, or even that it would not be  
15 appropriate for the agency to do so.

16 I direct Your Honor's attention to the  
17 Commission's ruling on January 25, 1995, in the Fox  
18 Television Station, Inc., case which is FCC No. 95-26, in  
19 which the agency did precisely that, which was waive  
20 attorney-client privilege and waive the deliberative process  
21 privilege insofar as it pertained to current and former  
22 Commission employees.

23 My clients cannot be expected to make the  
24 determination as to whether or not certain questions violate  
25 their privilege with the agency without going to the agency

1 and seeking to have the extent to which that privilege will  
2 be impacted on this proceeding clarified.

3 JUDGE CHACHKIN: But first of all --

4 MR. DZIEDZIC: I am not bringing that up to be  
5 oppositional.

6 JUDGE CHACHKIN: Hasn't there been a --

7 MR. DZIEDZIC: I think this is a fundamental --

8 JUDGE CHACHKIN: Hasn't there been a waiver in  
9 light of the statements made which are already in the record  
10 made to the Inspector General and to the appellate body? I  
11 mean hasn't there been a complete waiver of all these  
12 matters? Isn't it a little late now to assert attorney-  
13 client privilege?

14 MR. DZIEDZIC: Your Honor, it is the agency's  
15 privilege.

16 JUDGE CHACHKIN: Whatever it is, --

17 MR. DZIEDZIC: The agency plainly --

18 JUDGE CHACHKIN: -- hasn't there been a waiver?

19 MR. DZIEDZIC: The agency plainly did not waive it  
20 in the Hearing Designation Order.

21 JUDGE CHACHKIN: But once there's been a --

22 MR. DZIEDZIC: My clients cannot be expected to  
23 assume that it has been waived. If the agency intends to  
24 waive it, it may do so.

25 JUDGE CHACHKIN: The question is whether the

1 agency has any right to on the matter since already there's  
2 been a full disclosure made by these employees. They didn't  
3 take the attorney-client privilege.

4 MR. DZIEDZIC: Do you feel you have delegated  
5 authority to rule on that matter, Your Honor?

6 JUDGE CHACHKIN: To rule on what? To rule on  
7 whether there's been a waiver? Certainly. Can you say  
8 there hasn't been a waiver when they've given statements and  
9 they've never --

10 MR. DZIEDZIC: I can suggest that I do not believe  
11 Your Honor has delegated authority to waive --

12 JUDGE CHACHKIN: I'm not waiving anything.

13 MR. DZIEDZIC: To rule on it.

14 JUDGE CHACHKIN: I have a right to rule on whether  
15 attorney-client privilege has been waived. Certainly.

16 MR. DZIEDZIC: In this context?

17 JUDGE CHACHKIN: In any context. I mean are you  
18 arguing that there hasn't been a waiver in light of the  
19 statements that they've already made?

20 MR. DZIEDZIC: I'm arguing it's not clear, Your  
21 Honor.

22 JUDGE CHACHKIN: I'm not talking about -- what's  
23 not clear? That there's been a waiver?

24 MR. DZIEDZIC: That the agency has --

25 JUDGE CHACHKIN: Or what? Hasn't the agency

1 effectively waived it by allowing the employees to give  
2 testimony on these matters?

3 MR. DZIEDZIC: Your Honor, the testimony that was  
4 given on these matters came to exist in two separate and  
5 distinct fashions. The first was an independent  
6 investigation by the Office of Inspector General.

7 I'm not aware that the Office of the General  
8 Counsel's Office knew that those interviews were taking  
9 place or had an opportunity to make a determination as to  
10 whether there should have been a waiver.

11 JUDGE CHACHKIN: Did the employees assert any  
12 attorney-client privilege?

13 MR. DZIEDZIC: Not to my knowledge.

14 JUDGE CHACHKIN: Well, it's a little late now in  
15 the game to do so, isn't it?

16 MR. DZIEDZIC: I don't think it's late in the game  
17 to seek clarification from the Commission on this matter.

18 JUDGE CHACHKIN: Clarification of what?

19 MR. DZIEDZIC: Particularly --

20 MR. COLE: Your Honor, if I might be heard on  
21 that.

22 As far as the Inspector General's interviews are  
23 concerned, even if interviews conducted by the Inspector  
24 General were somehow subject to a privilege, I filed a  
25 Freedom of Information Act request and was provided with



1 copies of those documents by the Commission, by the  
2 Inspector General's Office.

3 The FOIA, as I understand it, has an exemption for  
4 deliberative process. That therefore if the Commission had  
5 wanted to assert that there was a deliberative process  
6 privilege somehow lurking in the disclosures contained in  
7 those transcripts, presumably it would have been asserted at  
8 that point two years ago, and it was not.

9 Then when the Court ordered the Commission or  
10 certain employees of the Commission to provide written  
11 statements, again there was no quarrel by the Commission or  
12 by the employees themselves, that I'm aware of, concerning a  
13 privilege. To the contrary, statements were forthcoming  
14 from the General Counsel's -- through the General Counsel's  
15 Office. An individual in the General Counsel's Office was  
16 the contact point for assembling and distributing those  
17 statements.

18 Therefore, I think the Commission is clearly aware  
19 that all these disclosures have been made, have been made on  
20 the record, and have been provided to all parties.

21 MR. DZIEDZIC: Then it should be very easy for the  
22 Commission to declare that that's the case.

23 JUDGE CHACHKIN: We don't need anything from the  
24 Commission. Under the law, where there's been a waiver,  
25 that's it. You don't need -- the party doesn't have to

1     assert that a -- giving up attorney-client privilege, if it  
2     has been in effect a waiver. Then I have a right to rule  
3     there's been in effect a waiver, where clearly there's been  
4     here, and there's no need for any further decision-making  
5     body to say anything.

6             MR. DZIEDZIC: I will submit, Your Honor, that I  
7     think we've exhausted this topic as the subject of  
8     conversation.

9             JUDGE CHACHKIN: All right.

10            MR. DZIEDZIC: And at an appropriate time when  
11     separated trial staff makes their submission to the  
12     Commission, we will file comments and the Commission will  
13     have an opportunity to deal with this.

14            I would be remiss in my responsibilities to my  
15     client if I didn't ensure that that was the case. And I'm  
16     not trying to be a road block to the proceeding.

17            JUDGE CHACHKIN: I understand.

18            MR. DZIEDZIC: I don't think it will be.

19            JUDGE CHACHKIN: Well --

20            MS. POLIVY: Your Honor.

21            JUDGE CHACHKIN: Yes, Ms. Polivy.

22            MS. POLIVY: I think what this points up is it  
23     points up that what the Commission should be asked for is  
24     simply to give their permission at deposition that any  
25     specific question to be raised should be raised before you,

1     whether it be on the question of attorney-client privilege,  
2     and I think the more complicated we make the request to the  
3     Commission the more certain we are that --

4             JUDGE CHACHKIN: To delay.

5             MS. POLIVY: -- it's going to delay and delay and  
6     delay. So if we could simply ask the Commission to say in  
7     this case they will permit in the appropriate circumstances  
8     depositions to be taken, and then have Mr. Dziedzic or any  
9     other person come to you with any objections or arguments  
10    they have as to the taking of the specific deposition we're  
11    going to be able to proceed somewhat more expeditiously.

12            I mean my client's interest is in getting as much  
13    information relevant available as quickly as possible. We  
14    do not want to drag this out into the 21st century.

15            JUDGE CHACHKIN: Now, as far -- go ahead.

16            MS. POLIVY: You know, it seems to me that you're  
17    the one in the best position to make that determination once  
18    the Commission says, "We'll unlock the gate," then it's  
19    yours.

20            JUDGE CHACHKIN: Well, as far as depositions are  
21    concerned, I would assume the only persons with relevant  
22    information would be those who spoke to either you or one of  
23    your agents who attended this meeting.

24            What other individuals could have relevant  
25    information concerning the actions of Rainbow?

1 MS. POLIVY: I have no idea, Your Honor.

2 MR. SILBERMAN: Is that addressed to Rainbow, Your  
3 Honor?

4 JUDGE CHACHKIN: Well, I address this to Rainbow.  
5 I address this to all the parties.

6 What other persons would have relevant information  
7 other than the ones --

8 MS. POLIVY: I think there are people in the IG's  
9 Office that may very well.

10 JUDGE CHACHKIN: Why? How would they have  
11 relevant information?

12 MS. POLIVY: Because they're the ones who spoke to  
13 the other people as well. And to the extent that there is  
14 any --

15 JUDGE CHACHKIN: What other people?

16 MS. POLIVY: -- any dispute as to what was said,  
17 they are in a position to shed light on this.

18 MR. DZIEDZIC: There is also a confidential  
19 informant indicated in the IG's report, Your Honor.

20 MS. POLIVY: Certainly we'd want to speak to that.

21 JUDGE CHACHKIN: Well, I don't see how if an  
22 individual wasn't present and didn't speak to Rainbow or its  
23 agents, how they could have any information relevant as to  
24 the actions of Rainbow or -- that's what I'm having --

25 MS. POLIVY: My question is whether it may lead to

1 relevant information is the deposition standard.

2 MR. BLOCK: Your Honor, may I respond to that now?

3 JUDGE CHACHKIN: Yes.

4 MR. BLOCK: I think, as I said initially, I think  
5 we should take this one step at a time. I think that the  
6 first wave of discovery clearly relates to the people we all  
7 agree were there and present. And that there's no dispute  
8 about.

9 Whether at some point it makes sense to look  
10 beyond that, there are two questions that are raised at that  
11 point and we are not in a position at this point to know how  
12 to answer those questions. One, do they have relevant  
13 information to the subject matter? And I don't know if we  
14 could agree on that or not. And, two, and this is I think  
15 important from the Commission's point of view, would the  
16 burden of an oral deposition be outweighed by their need to  
17 testify versus with interrogatories, which the parties have  
18 a right to request?

19 So there are two levels that we haven't -- and we  
20 can't answer those questions yet and we shouldn't be  
21 spending our time here, I don't believe, debating  
22 hypotheticals about that. We are prepared to agree on a  
23 list that is relatively short because the people are already  
24 known and we can proceed from there.

25 If I may, at the appropriate time, there's a

1 couple of points that Mr. Dziedzic has said that we believe  
2 are just misguided, and I would like to clarify the record,  
3 but I'll defer to when that --

4 JUDGE CHACHKIN: Well, you might as well do it  
5 now.

6 MR. BLOCK: Okay. We are not filing a document  
7 with the General Counsel's Office to have the General  
8 Counsel's Office rule on anything. We are seeking a pair of  
9 legs with access to the Commission that can walk up to the  
10 Commission as we might not be able to do, and also give us  
11 some insulation to say, "Here is what we would like to do.  
12 Can we get a signature?"

13 That is not a filing with the General Counsel's  
14 Office, nor is the General Counsel a decision maker in that  
15 matter. There's no designation -- no delegative authority  
16 issue.

17 Your Honor has already suggested the documents  
18 that we file with the General Counsel for filing with the  
19 Commission ought to be disclosed. We've agreed to that.  
20 The expedition request would be part of that same  
21 presentation, which would be revealed to everybody.

22 The question about deliberative privilege and  
23 attorney-client privilege is not the privilege of the  
24 employees. It's the privilege of the Commission. We are  
25 the Commission in this matter. We represent the Commission

1 in this matter.

2 We agree with Your Honor on two matters. Number  
3 one, that to the extent that that has already been discussed  
4 in public, revealed in public, whether or not it was  
5 intentional, intentionally waived or not, at this point, now  
6 years past and two public documents past, there is no  
7 longer, for those matters already in the public domain,  
8 there's no privilege to assert. And I don't know, looking  
9 at the Fox decision, but I wouldn't be surprised if the  
10 reason the Fox decision had to make that kind of waiver is  
11 because they've not yet been disclosed.

12 Deliberative process as well, the same point  
13 there. That to the extent that we have already discussed  
14 the thinking and planning of the employees at issue have  
15 already been disclosed, it's been disclosed.

16 We also agree with Your Honor that you have the  
17 authority in any matter on evidentiary question presented to  
18 you as to whether or not what has happened is sufficient for  
19 a waiver. We agree that you don't have the power to waive  
20 the privilege of a party, but you can rule that a privilege  
21 has already been waived, and that's your domain.

22 I believe that responds to each of Mr. Dziedzic's  
23 points.

24 JUDGE CHACHKIN: Well, while we're with the ex  
25 parte issue, let me raise another question which is going to

1 be thorny I'm afraid.

2 And that is is Ms. Polivy going to be a witness,  
3 and, if so, how does that affect her status as counsel?

4 MS. POLIVY: Your Honor, we have the burden under  
5 the issue and we have not yet determined how to go forward.

6 In the event that I am a witness, I don't think  
7 the question would come up on discovery, but it would come  
8 up in the hearing, we may request that you sever that issue  
9 and try it separately.

10 JUDGE CHACHKIN: What do you mean try it  
11 separately?

12 MS. POLIVY: Well --

13 JUDGE CHACHKIN: Issue an IV on the others?

14 MS. POLIVY: There are four issues.

15 JUDGE CHACHKIN: Well, what does that mean? I  
16 can't bifurcate the hearing.

17 MS. POLIVY: Well, you could hear that issue and  
18 then hear --

19 JUDGE CHACHKIN: Take care of the other issues  
20 before that issue?

21 MS. POLIVY: Either way -- yes. In any case, that  
22 is not a determination that we have yet made.

23 JUDGE CHACHKIN: Well, I'm also interested in the  
24 views of the parties, the propriety of the firm continuing  
25 to represent Rainbow in light of the fact that Ms. Polivy



1 appears to be a necessary witness.

2 MS. POLIVY: Well, Your Honor, that is not yet  
3 clear that I am.

4 JUDGE CHACHKIN: If you were a participant in  
5 these meetings --

6 MS. POLIVY: In view of the fact that we have the  
7 burden -- proceeding on the burden of proof, I think that's  
8 a determination for Rainbow to make.

9 JUDGE CHACHKIN: But the parties have a right to  
10 call you as a witness whether or not you decide not to call  
11 yourself as a witness.

12 MS. POLIVY: Well, Your Honor, that may or may not  
13 be so. I mean leaving aside the question of discovery, if  
14 the parties call a lawyer as a witness, the question is to  
15 whether or not that lawyer is a necessary witness is a  
16 determination that would be made on the basis of the whole  
17 presentation.

18 JUDGE CHACHKIN: You were a participant at the  
19 meeting, were you not?

20 MS. POLIVY: That does not make me, Your Honor,  
21 necessarily a necessary witness. If the information can be  
22 gotten from other people, that does not make me a necessary  
23 witness.

24 JUDGE CHACHKIN: Well, it would be hearsay --

25 MS. POLIVY: I think that --

1 JUDGE CHACHKIN: Wouldn't it be hearsay if someone  
2 else testified as to what you said? Wouldn't we need your  
3 testimony as to what took place at the meeting, what you  
4 said at the meeting?

5 MS. POLIVY: Well, Your Honor, the question is,  
6 number one, whether it's permissible hearsay. There are all  
7 kinds of sworn statements already in the record as to what  
8 was said. That is simply -- if you are asking to sit here  
9 today to make a determination, it's a complicated  
10 determination that is at this point I think premature to  
11 make.

12 JUDGE CHACHKIN: Well, I'd like to know the views  
13 of the other parties. I don't want to be later on, before  
14 we proceed, raise -- the question is raised whether Ms.  
15 Polivy can continue as counsel. So I'd like to ask Mr.  
16 Cole.

17 MR. COLE: Your Honor, I think she is clearly a  
18 necessary witness. She was central to the -- certainly with  
19 respect to the ex parte issue, and possibly with respect to  
20 the other issues, but I don't think there's any question  
21 with respect to the ex parte issue that Ms. Polivy's conduct  
22 was central to not only the meeting but also the preliminary  
23 contacts leading up to the meeting. And it would be  
24 something that I think the record would be clearly  
25 inadequate if she were not on the stand.

1           As I understand the Lawyer as Witness rule, she  
2 would not -- even if she were determined likely to be a  
3 necessary witness, she would still be permitted to  
4 participate in the pre-trial proceedings on behalf of the  
5 client, but would have to step aside at the hearing stage if  
6 she were to be called as a witness on the issue.

7           JUDGE CHACHKIN: Well, is it your intention to  
8 call her as a witness?

9           MR. COLE: Yes.

10          JUDGE CHACHKIN: Mr. Silberman, what is your view?

11          MR. SILBERMAN: Mr. Block will speak to this issue  
12 on ex parte.

13          MR. BLOCK: On the question of whether or not Ms.  
14 Polivy will be a witness, we agree that she is likely to be  
15 a witness at this stage. We also agree that she has the  
16 burden of proof, and she may in fact refuse to testify and  
17 bear the risk of an adverse determination on the merits of  
18 her failing to meet the burden of proof as to the  
19 intentional violation --

20          JUDGE CHACHKIN: What do you mean refuse to  
21 testify?

22          MR. BLOCK: She could say that.

23          JUDGE CHACHKIN: You mean she's called as a  
24 witness on behalf of -- one of the parties calls her as a  
25 witness and she refuses to testify, wouldn't that have a

1 bearing on the issues?

2 MR. BLOCK: It would, yes.

3 JUDGE CHACHKIN: The determination of the issues?

4 MR. BLOCK: I agree. That would be a risk that  
5 she would bear, and perhaps you could order -- it would be  
6 failure of proof. But --

7 JUDGE CHACHKIN: Couldn't it lead to a default?

8 MR. BLOCK: It could very well.

9 I believe that -- I might suggest the appropriate  
10 procedure here would be if Mr. Cole wishes to make a motion  
11 to disqualify as to certain things -- that could be briefed  
12 and argued. There are question -- I made a list of a couple  
13 of them for Your Honor's consideration, as to whether the  
14 rules of professional conduct apply and how it might apply  
15 at the Commission level.

16 And there is an issue, as I recall, just from  
17 prior experience, that when an opposing party calls a  
18 lawyer, that does not automatically lead to disqualification  
19 because otherwise an opposing party could always sort of  
20 circumvent the -- or injure the opposing party by calling  
21 the lawyer, who may be a witness, but may not be the  
22 essential witness in some instances. There's a certain body  
23 of law that's built up around that that ought to be  
24 discussed if there's going to be a ruling about this down  
25 the road.

1 JUDGE CHACHKIN: Well, I'm not going to make a  
2 ruling unless a party files a motion. I just raised the  
3 question that if this is going to come up, I think the  
4 parties should file this motion, any of the parties, as soon  
5 as possible, so we can get a ruling on this before we  
6 proceed too much further down the road.

7 MR. BLOCK: It also may be possible, again, for  
8 issues to be considered, it may be possible that without  
9 necessarily bifurcating the matter, that Ms. Polivy may  
10 possibly be ruled inappropriate to handle this portion of  
11 the matter but other portions of the matter would be  
12 appropriate.

13 But, you know, I think we can refer all that in  
14 the briefs and sort of discuss it as it becomes clearer as  
15 to what the issues really are on that matter.

16 MR. COLE: Your Honor.

17 JUDGE CHACHKIN: Mr. Cole.

18 MR. COLE: With respect to the motion to  
19 disqualify, I would like to first, as far as the possibility  
20 of a failure of proof, a motion for summary decision or  
21 something along those lines, because a failure of proof if  
22 Rainbow were not to present Ms. Polivy, reserve the right  
23 obviously to raise that and not call her down the line, if  
24 she doesn't put herself on the stand, and I view there to be  
25 a hole in the record, I may not call her, and I want to be

1 clear that while I said I would call her, that assumes one  
2 set of --

3 MS. POLIVY: Your Honor, you can't rule on that.

4 JUDGE CHACHKIN: Well, I'm not ruling on anything.

5 MS. POLIVY: But I mean to say in advance, Mr.  
6 Cole wants a check that says there will be a failure of  
7 proof if so and so does not take place.

8 JUDGE CHACHKIN: I just want to know, Ms. Polivy,  
9 since you represented Rainbow at the meeting, how you could  
10 take the position that you're not a necessary party.

11 MS. POLIVY: Well, Your Honor, it is as Mr. Block  
12 has made reference to, an area that has a large body of law.  
13 That does not make the assumption that simply because  
14 someone was someplace that they are, number one, a necessary  
15 witness. And, number two, a witness that has information  
16 that cannot be gotten some other way.

17 JUDGE CHACHKIN: Well, you would be -- you  
18 represented Rainbow at this meeting. Apparently you were  
19 the only one there representing Rainbow. How could --

20 MS. POLIVY: Well, Rainbow was there. Rainbow's  
21 principals were there. Commission staff was there. This is  
22 not, Your Honor, I think a subject that is appropriate for  
23 oral argument at this stage.

24 JUDGE CHACHKIN: Well, I don't --

25 MS. POLIVY: It is a complicated legal question

1 and it is one that we are aware of and are prepared to  
2 address at the time that it's appropriately raised, but I  
3 don't think that we are prepared to address it in the pre-  
4 hearing conference on the basis of all kinds of suppositions  
5 that we're not in a position to make.

6 JUDGE CHACHKIN: Well, I'll leave it for the  
7 parties to file a motion. If a motion is made, I'll rule on  
8 it.

9 But I want to indicate, Ms. Polivy, that the  
10 reason I'm bringing this up is I would hope we don't have a  
11 situation where if it does turn out that you're disqualified  
12 from representing Rainbow, that you don't ask for some long  
13 delay to obtain new counsel.

14 And that's one of the reasons why I brought it up  
15 at this early stage. I want to avoid that situation and put  
16 you on notice at least of the possibility that this question  
17 may come up, and therefore that situation may develop. And  
18 so that you should be aware and take whatever steps you want  
19 to take so that we don't have an extensive -- we don't have  
20 a delay while new counsel has to familiarize himself with  
21 the case.

22 But it may be that we could bifurcate the  
23 proceeding and so that there will have to be other counsel  
24 to represent Rainbow insofar as the ex parte issue is  
25 concerned. But that you may still be able to represent

1 Rainbow in connection with the other issues. That's one  
2 possibility.

3 Insofar as Issue 2 is concerned, do any parties  
4 wish to -- need any clarification or have anything they want  
5 to discuss? That's the financial issue, financial  
6 qualification issue.

7 You raised the concern, Mr. Cole, about the  
8 existence of documents relating to the efforts made by  
9 Rainbow, the Applicant, to obtain its financial -- to obtain  
10 sufficient funds to build an operator station.

11 MR. COLE: Yes, Your Honor.

12 JUDGE CHACHKIN: Are all those documents still in  
13 existence, Ms. Polivy?

14 MS. POLIVY: Your Honor, I think that as I read  
15 the issue, what we're talking about is the fifth and sixth  
16 extensions.

17 JUDGE CHACHKIN: No, we're not talking about the  
18 fifth -- we're talking about Issue 2.

19 MS. POLIVY: I understand. What is in issue in  
20 this proceeding could determine whether we made  
21 representation in fact lacking candor with respect to the  
22 filings that were made which are in fact the fifth and sixth  
23 extensions to File No. BMPCT-910625 and --

24 JUDGE CHACHKIN: I'm not talking about Issue 3.  
25 Issue 2 doesn't talk about any extensions. The issue talks



1 about your initial ability to finance the construction to  
2 operate the station.

3 MS. POLIVY: Well, the way that -- are you talking  
4 about Rainbow's initial ability with respect to its  
5 application for construction permit?

6 JUDGE CHACHKIN: Yes. That's what Issue 2 is.

7 MS. POLIVY: Going through --

8 JUDGE CHACHKIN: Whether initially you were  
9 qualified financially to build and operate -- whether you  
10 made misrepresentations concerning your ability to construct  
11 and operate the station.

12 MS. POLIVY: Prior to getting the permit?

13 JUDGE CHACHKIN: Yes, prior to getting the permit.  
14 That's what Issue 2 speaks about.

15 Do you think it doesn't speak about that?

16 MS. POLIVY: Your Honor, I'd be perfectly willing  
17 to make that showing, but I believe that what the Commission  
18 has in mind is whether or not there was a misrepresentation  
19 regarding financial qualification in obtaining the extension  
20 of time to construct, not the initial permit.

21 JUDGE CHACHKIN: That's not what the issue says.

22 MS. POLIVY: Well, Your Honor, we'd be perfectly  
23 willing to make a showing regarding the initial permit.

24 MR. COLE: Your Honor.

25 JUDGE CHACHKIN: Mr. Cole.